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IN THE
COURT OF APPEALS OF INDIANA

WILBERT JARVIS, Appellant-Defendant, vs. ALEXIS B. ELMORE, a Minor, by Next Friend, Audra Deck, Appellee-Plaintiff.	)	No. 84A01-0110-CV-377

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Thomas E. Johnson, Special Judge
Cause No. 84D01-9809-CT-1606

October 30, 2002

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Wilbert Jarvis challenges the trial court's denial of his motion for summary judgment in favor of Alexis Elmore in an action to recover damages sustained from a dog bite.[1] Jarvis presents the following restated issue for review: Did the trial court err in denying Jarvis's motion for summary judgment?

We reverse.

The facts most favorable to the non-movant reveal that on June 11, 1998, Elmore was taken to Donald Guthrie's apartment while in the care of her babysitter, Yvonne Tolliver. Tolliver took Elmore to Guthrie's apartment to visit Guthrie's girlfriend, Jamie Rogers, who also lived in the apartment. While visiting Rogers, Elmore was severely bitten by Guthrie's Rottweiler dog, Zeus. Elmore was bitten on her face, above the jaw, on the chin, inside her mouth, and on her neck. Elmore was two-years-old at the time of the incident.

Guthrie and Rogers live in a three-unit apartment house at 116 N. 22nd Street in Terre Haute, Indiana. The house is owned by Jarvis. Jarvis has no written lease with either Guthrie or Rogers. At the time of the incident, Jarvis had no written policy concerning pets or animals in the apartments. Tenants were permitted to have pets, and there were no prohibitions against any particular types of pets or any particular breed of dog. Jarvis has since changed his policy and no longer permits tenants to have Rottweilers, Pit Bulls, or Shepherds. Jarvis does not recall whether he was aware that

[1] Oral argument was held at Brown County High School in Nashville on September 19, 2002.

Guthrie had a Rottweiler prior to renting to Guthrie on May 6, 1998. He was, however, aware that Guthrie had a Rottweiler on the premises prior to the incident with Elmore.

On September 24, 1998, Elmore, a Minor, by Next Friend, Audra Deck, filed a complaint for personal injury against Jarvis. Subsequently, Jarvis filed a Motion for Summary Judgment. After hearing oral argument on the motion, the trial court entered an order denying Jarvis's motion for summary judgment. In denying the motion, the trial court articulated the following:

> [Court]: … I am not making this all a part of the record in the order, but I am just going to deny the motion for summary judgment. But just for your benefit, I am relying on the fact that the landlord in this case had the right to decide whether or not the people that live there could have pets or not. I am saying that is some control that he exercises.
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> [Court]: Well I guess the question, the reason I am leaving it up to a jury to make a decision is that I am saying that the guy that owned the building in this case, Jarvis, had some duty to make some determination whether or not he feels that dog, that he saw, he said, "I saw that dog and it looked like a big fluffy dog" was basically a potential risk to people that would come on the premises and go to various apartments in this building. That is basically what the ruling is….

Appendix at 19-20.

The purpose of summary judgment is to end litigation about which there can be no factual dispute and which may be resolved as a matter of law. *Baker v. Weather ex rel. Weather,* 714 N.E.2d 740 (Ind. Ct. App. 1999). When reviewing a grant or denial of summary judgment, we apply the same standard as the trial court. Summary judgment is appropriate only where the designated evidentiary material shows that there is no genuine

issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Hayden v. Paragon Steakhouse*, 731 N.E.2d 456 (Ind. Ct. App. 2000). We resolve all facts and reasonable inferences therefrom in favor of the nonmoving party. *Merchants Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383 (Ind. Ct. App. 2000). Although summary judgment is not usually appropriate in a negligence case, it is appropriate if the undisputed material facts negate at least one element of the plaintiff's claim. *Baker v. Weather ex rel. Weather,* 714 N.E.2d 740.

In order to prevail on her claim against Jarvis, Elmore was required to show that Jarvis retained control over the property. *See Baker v. Weather ex rel. Weather,* 714 N.E.2d 740. She was also required to show that Jarvis had actual knowledge that the dog had dangerous propensities. *Id.*

For purposes of this appeal, we will assume arguendo that Jarvis had control over the property.[2] The question becomes whether the designated evidence is sufficient to indicate a genuine issue of material fact with regard to whether Jarvis had actual knowledge of Zeus's dangerous propensities.

The designated evidence indicates that Jarvis had not received any complaints about the dog's behavior. There was no evidence that the dog had displayed any kind of hostile personality or aggressive behavior around Elmore or any other people. Jarvis had no notice of any property damage caused by Zeus, or any type of wounds on Zeus that

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[2] While Jarvis argues that he did not retain or exercise control over any portion of Guthrie's apartment, we decline to address this argument based on our determination that Jarvis had no actual knowledge of the dog's dangerous propensities. *See Baker v. Weather ex rel. Weather,* 714 N.E.2d 740 (declining to address the control issue where there was no genuine issue of material fact as to whether landowners had actual knowledge of the dangerous propensities of the dogs).

would indicate that the dog had been involved in aggressive behavior with other animals. Furthermore, Jarvis was unfamiliar with the Rottweiler breed and did not consider dogs in general to be dangerous. As such, prior to the incident with Elmore, Jarvis had no actual knowledge of Zeus's dangerous propensities.

Elmore seems to advocate that despite Jarvis's lack of actual knowledge, Jarvis should nevertheless be held to have constructive knowledge because he should have known that certain breeds of dogs, including Rottweilers, are generally known to be dangerous. Because Jarvis should have known that Rottweilers are a dangerous breed, Elmore maintains that Jarvis had a duty to take reasonable measures to protect Elmore from the risk of harm while at Guthrie's apartment.

At common law, all dogs, regardless of breed or size, are presumed to be harmless, domestic animals. *Royer v. Pryor*, 427 N.E.2d 1112 (Ind. Ct. App. 1981). To overcome the presumption that a domestic animal, as opposed to a wild animal, is harmless, there must be evidence demonstrating a known vicious or dangerous propensity of the animal in question. *Id.* As such, we reject the strict liability standard advocated by Elmore. Creating per se categories of "dangerous breeds" essentially eviscerates the actual knowledge element of the test.[3] Whether the landowner is actually aware that the dog has dangerous propensities becomes inconsequential. If the dog falls into a specific category

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[3] Even if we were to accept the strict liability standard advocated by Elmore, there is insufficient evidence designated to the trial court to support Elmore's contention that Rottweilers should be categorized as a "dangerous breed". Although she submits reports and statistics in support of her contention in her appellate brief and Notice of Additional Authority provided to this court, we decline to consider the new evidence. On review, we may only consider evidence that was *specifically designated to the trial court. Hayden v. Paragon Steakhouse*, 731 N.E.2d 456.

or breed of dogs, the landowner is held to have knowledge of its dangerous propensities, regardless of the landowner's actual knowledge. We decline to adopt such a standard. In the absence of *actual knowledge* of the vicious propensities of a tenant's dog, a landlord owes no duty to third persons injured by the dog. *Goddard by Goddard v. Weaver*, 558 N.E.2d 853 (Ind. Ct. App. 1990). Consequently, Jarvis did not owe a duty to Elmore, and he cannot be liable for her injuries.

Judgment reversed and remanded.

SHARPNACK, J., concurs.

NAJAM, J., concurs with separate opinion.

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NAJAM, Judge, concurring

I fully concur with my colleagues, but write separately to comment on the premises liability issue. Our opinion is correct that we need only address the dangerous propensity prong of the test set out in Baker v. Weather ex rel. Weather, 714 N.E.2d 740 (Ind. Ct. App. 1999). But given the trial court's stated reason for denying summary judgment, I believe it is also important to address the issue of control over the leased premises.

It is well settled that, as a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property. Smith v. Standard Life Ins. Co. of Ind., 687 N.E.2d 214, 217 (Ind. Ct. App. 1997). Here, it is undisputed that Jarvis did not retain or exercise control over Guthrie's apartment when Elmore sustained her injuries.

But in support of its denial of Jarvis's summary judgment motion, the trial court stated that "the landlord . . . had the right to decide whether or not the people that live there could have pets or not. I am saying that is some control that he exercises." Appendix at 35. In other words, the trial court concluded that an issue of fact existed regarding whether control exercised by Jarvis at the inception of the lease precluded summary judgment.

A trial court's findings and conclusions on summary judgment are not binding on this court. LeBrun v. Conner, 702 N.E.2d 754, 756 (Ind. Ct. App. 1998). Thus, the trial court's rationale does not affect our standard of review on appeal. But the trial court's conclusion, that Jarvis exercised "some control" when he decided that Guthrie could keep a Rottweiler, misconstrues the control element of premises liability. If followed, this relation-back theory of control would represent a significant, even radical, departure from the general rule that liability attaches to the party who controls the premises at the time a claimant sustains injury. See id. The fact that a landlord controls the premises through the lease terms negotiated at the inception of a lease does not mean that he controls the premises throughout the lease term.

The law does not require that landlords be clairvoyant, that they anticipate all potential acts or occurrences. The dispositive question is: who controls the premises when the cause of action accrues? The landlord does not become liable merely because he might have avoided the act or occurrence with a different lease. The trial court erred when it found that a question of fact existed on the issue of Jarvis' control over the premises when Elmore sustained her injuries.

SHARPNACK, J., concurs.